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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RICHARD K. ROBERTS et al., Plaintiffs and Respondents, v. HOME AMERICAIR et al., Defendants and Appellants.	G031238 (Super. Ct. Nos. 813664 & 01CC12811) O P I N I O N

Appeal from an order of the Superior Court of Orange County, John M. Watson, Judge. Reversed with directions.

Law Office of Dean P. Sperling, Dean P. Sperling; Snell & Wilmer, Richard A. Derevan, Elizabeth Weldon for Defendants and Appellants.

Ducote & Frasca, Harold A. Ducote, Joanne M. Frasca, Sara A. McClintock for Plaintiffs and Respondents.

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Normally, if a plaintiff sues a defendant, and they settle, and pursuant to the contract of settlement the plaintiff dismisses the action, and thereafter the defendant breaches the contract, the plaintiff must file a new action to enforce the settlement agreement. Jurisdiction, after all, terminated over the defendant with the filing of the

dismissal. The new action is not a re-run of the old suit, but something new -- a breach of the contract action based on the settlement agreement.

However, if, prior to the loss of jurisdiction, the parties request the court to retain jurisdiction to enforce the contract, it *may* do so, obviating the need to file a new action. Section 664.6 of the Code of Civil Procedure allows a court, in the exercise of its discretion, to retain jurisdiction to *enforce* the terms of a settlement upon the request of the parties.[1]

In this case, the parties reached an agreement, which they submitted to the trial court in sealed envelopes. The trial court never actually ordered the agreement sealed, so technically it wasn't a "sealed" agreement. In any event, the trial judge certainly never read the agreement, which provided that the Orange County Superior Court was to have "jurisdiction to enforce the terms and conditions of the Agreement." And there certainly was no formal request presented to the judge to retain jurisdiction. He was not informed of that provision prior to the dismissal of the case. Thus he did not have occasion to exercise the discretion given him by the statute to retain jurisdiction to enforce the settlement or not.

After dismissal, one of the parties made a motion to enforce the agreement. By that point, however, the court had lost its jurisdiction. The trial judge, however, concluded that the provision in the agreement was enough by itself to confer jurisdiction on him to make an enforcement order.

That was error. The provision in the settlement agreement itself was not enough under section 664.6. If it were, the language of the statute which contemplates the exercise of discretion on the question of whether to retain jurisdiction to enforce the agreement upon the request of the parties would be short-circuited. We therefore must reverse the postjudgment order, with directions to enter a new order denying the motion.

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[1] The key provision is in the second sentence of the statute, which provides, in its entirety: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

All statutory references in this opinion are to the Code of Civil Procedure.

FACTS

Home Americair and Home Americair of California (Americair) are two corporations engaging in the business of providing oxygen equipment and related services to patients in their homes and in other nonhospital environments. Americair also franchises its business nationwide. Richard Roberts, Nancy Roberts, and Stephen Fitch (the Roberts)[2] were the minority shareholders of Americair. They are also the majority shareholders of Chicago Medical Products, Inc., a franchisee of Americair.

Problems arose in Americair's domain in 1999 when its majority shareholder, Tom Frank, got a divorce and transferred all of his shares to his ex-wife, Marianne Frank. Frictions between Marianne Frank and the Roberts quickly began to escalate. Eventually, numerous lawsuits, cross-complaints, and appeals between Marianne Frank, Tom Frank, Americair, the minority shareholders of Americair, and several of Americair's franchisees erupted across the Southern California courts. The multitudes of different cases were eventually consolidated into one action.

Before the trial, the parties (except Tom Frank) concluded a settlement agreement; Chicago Medical, a non-party, joined in the agreement. Though the parties never formally requested that the court order the settlement sealed, it was submitted to the court in a sealed envelope. In the wake of the settlement the Roberts dismissed their suits against all defendants, except Tom Frank.

A new dispute soon arose between the parties. Citing a setoff provision in the settlement agreement, the Roberts claimed that Americair should not have collected certain franchisee fees (about $26,000), from Chicago Medical. The Roberts then filed a motion to enforce the agreement under the Code of Civil Procedure section 664.6.

Immediately thereafter (and independent of their filing the motion to enforce), the Roberts submitted to the court a request for dismissal of the last defendant, Tom Frank, and copies of which were also served to the perspective parties. However,

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[2] Richard Roberts died while the lawsuits were in progress. After his death, Edward Estrin, his Personal Representative, substituted Richard Roberts as the plaintiff.

the Clerk, due to some technical mistake on the form not disclosed in the record before us, rejected the filing.

Americair responded with a special appearance to challenge the court's jurisdiction. It argued that because the Roberts had dismissed their action against the last defendant, the court no longer had jurisdiction. The Roberts contended, however, the dismissal of the last defendant (Franks) was never complete; therefore, the suit was still on going. In the alternative, the Roberts asserted that regardless of whether they had already dismissed the entire action, the court retained jurisdiction because the parties had requested retention of jurisdiction through a provision in the settlement agreement.

The trial judge readily acknowledged that he had never seen the agreement prior to the motion.[3] Despite that, he concluded that the provision in the agreement was sufficient to confer jurisdiction on it to enforce the agreement, and filed a judgment declaring that Americair had wrongfully withheld about $26,000 in funds belonging to Chicago Medical. It also ordered the payment of the $26,000 to Chicago Medical, and awarded about $59,000 in attorney fees to the Roberts. From that order Americair has brought this appeal.

DISCUSSION

The Entire Case Had Been Dismissed Prior To the Order

It is clear that the Roberts dismissed their complaints against Americair well prior to any attempt to enforce the settlement agreement. That makes this an easy case. The court no longer had jurisdiction over *Americair* to enforce the agreement in the case before it. (See *Sere v. McGovern* (1884) 65 Cal. 244, 245-246 [dismissal of one of the defendants ousted the court of jurisdiction over that defendant]; *Gherman v. Colburn* (1971) 18 Cal.App.3d 1046, 1050 [voluntary dismissal pursuant to section 581 means that court loses jurisdiction to make further orders over the case]; *Associated*

[3] Here are some excerpts from the transcript, all statements by the court: "There's also the question in my mind -- and I haven't read the settlement so I don't known what the terms are . . . ." "[Speaking of the agreement] which, incidentally, of course, I'm not a party to, because it was sealed [¶] . . . . But I don't think I ever looked at it. [¶]Did you give it to me under seal?"

Convalescent Enterprises v. Carl Marks & Co., Inc. (1973) 33 Cal.App.3d 116, 120 [voluntary dismissal is effective immediately to terminate court's jurisdiction to take any further actions].)

On the jurisdictional point, the Roberts (particularly at oral argument) present a syllogism which is essentially a variation on *Casa de Valley View Owner's Assn. v. Stevenson* (1985) 167 Cal.App.3d 1182. (We explain below that *Casa de Valley View* is both distinguishable from this case and poorly reasoned in any event.) That variation goes essentially like this: The court had subject matter jurisdiction over the judgment and it also had personal jurisdiction over Americair by virtue of the abortive dismissal of Franks.

There are two answers to this reasoning. The first is the simplest. When Americair was dismissed, *it* was out of the case, and that is dispositive. (See *Sere v. McGovern, supra,* 65 Cal. at pp. 245-246 [when one defendant of several is out, that defendant is really out].)

The second is slightly more complex. The premise of the Roberts' argument -- that the botched dismissal serendipitously preserved jurisdiction -- is wrong. When it comes to dismissals, courts look to substance over form, and here the substance was that Franks was being dismissed too.

"It is been held that the effect of the filing of a proper request for dismissal is '*ipso facto*, to dismiss the case, even though the clerk fails to make entry thereof in the register. In such case, prohibition will lie to restrain the court from proceeding with the trial, for the reason that the court has been ousted of jurisdiction by the act alone of plaintiff.'" (*Egly v. Superior Court* (1970) 6 Cal.App.3d 476, 479-480, quoting *Hunting Park Co. v. Superior Court* (1911) 17 Cal.App. 692, 694.) Moreover, an "oral or written request to the court at any time before the actual commencement of trial" will suffice to dismiss an action. (Code Civ. Proc., § 581, subd. (b)(1).) Thus the written request to dismiss the case, as we have here, was sufficient by itself. Indeed, the Roberts served copies of the dismissal on all the parties.

Now to *Casa de Valley View Owner's Assn. v. Stevenson, supra,* 167 Cal.App.3d 1182.

The messy details in *Casa de Valley View* require some explication: A homeowners' association sued the developers of a condominium conversion project. As it happened, the president of the association at the time was himself a lawyer and *he* represented the association in the litigation. Then the association elected new directors, who terminated his services. Instead of going quietly, the lawyer (and his wife) filed a complaint in intervention claiming that the new directors had a conflict of interest and were in collusion with the developer. Meanwhile, the lawyer was suing two of the new directors in another case. While the motion to intervene was denied, the trial court did allow the lawyer and wife to come in as *plaintiffs* against the developer only. That was probably a mistake by the trial court, because the lawyer and his wife were asserting claims against *both* the association and the developer, and, as the appellate court later noted, were genuinely adverse to the association. In any event, there was a global settlement conference, which resulted in a deal whereby the developer was to pay the association $250,000, pay the lawyer and wife $20,000, and the lawyer would give the association and its new counsel releases. The lawyer and wife got the money, and filed dismissals of the defendants (i.e., the association and related parties), but then reneged on signing releases *for the association*. That action prompted the association to seek a release by way of a section 664.6 motion. In affirming the subsequent order, the appellate court had no problem with the fact that, at least ostensibly, the enforcement motion had been postured as one plaintiff seeking relief from another. The reality of the situation was that the lawyer and his wife and the association were adverse to one another. (*Casa de Valley View, supra*, 167 Cal.App.3d at p. 1190.)

The fact the lawyer and his wife had dismissed their actions and were thus out of the case was not dealt with in a particularly convincing way. The appellate court reasoned that because the trial court continued to have *subject matter jurisdiction* the action could continue; the opinion was conspicuously silent on the fact that the trial court

no longer had *personal* jurisdiction over the lawyer and his wife. (See *id*. at p. 1192.) The best it could do was to fall back on the waiver and estoppel theories.

As to waiver, the appellate court said that because the lawyer opposed the section 664.6 to compel enforcement of a stipulation *on the merits*, he had waived any lack of personal jurisdiction. (See *id*. at p. 1192.) As to estoppel, the court said that because the lawyer was paid hard cash -- $20,000 -- and the enforcement action was to ensure that he lived up to the concomitant responsibility of signing a release of a co-party, he was estopped to assert lack of personal jurisdiction. (*Ibid*.)

Casa de Valley View is distinguishable from the case before us. There, unlike here, the party opposing the enforcement motion did so on the merits, thus establishing a waiver of personal jurisdiction. There, unlike here, the party opposing the motion had not acted inequitably in having substantive claims *against* another party which it had been paid to dismiss and then refused to dismiss them.

That said, *Casa de Valley View* is not a particularly convincing case on its own terms. Essentially, the court was bound and determined to affirm the order enforcing the motion because, to be blunt, the lawyer who opposed the motion had been acting like, well, the polite term would be a horse's posterior. The lawyer had substantive claims against the homeowner's association but because the trial court had not allowed him to file a complaint in intervention, it *looked* as if he was only suing the developer. His refusal to grant a release to the association after he had dismissed his action against the developer was pure opportunism rooted in the ungainly posture of the case created by the trial court in refusing to allow him to file a complaint in intervention against both the developer and association. In that context, the waiver and estoppel rationales were "reaches," in which the appellate court was trying to somehow find a way to get to the obviously right result.

For what it is worth, a cleaner way of getting to the same result might have been to recognize the substance of litigation from the beginning, which was that the lawyer and his wife had claims against the association, that their complaint was in substance a complaint in intervention against both the developer and the association (the

trial court was wrong to deny the motion to file a complaint in intervention), and that, not having dismissed the association, the lawyer and his wife were still *substantively* in the case. And *that* is a far cry from the case before us, where Americair was cleanly out of the case when *it,* as a defendant, was dismissed, and any claims which a nonparty (Chicago Medical) might have had against it had to be the subject of a different suit. (That explains, however, why Americair spends so much of its time in its brief stressing the nonparty status of Chicago Medical.)

The Request In the Agreement
Was Ineffective to Confer Jurisdiction

The Roberts next argue that even if the action has been dismissed, the court still retained jurisdiction to enforce the settlement because the agreement contains a provision contemplating jurisdiction to enforce the agreement.

The problem with this argument is that it runs afoul of the actual text of section 664.6. There is nothing to indicate that *prior* to the settlement agreement and consequent dismissal of the plaintiffs' actions the court was offered the opportunity to exercise its discretion to retain jurisdiction to enforce the settlement. But the statute clearly requires that such an opportunity be offered to the court before it loses jurisdiction over the case. Notice the second sentence: "If requested by the parties, the court *may* retain jurisdiction over the parties to enforce the settlement . . . ." (Code Civ. Proc. §664.6, emphasis added)

A court is thus not *required* to retain jurisdiction to enforce a settlement agreement. It *may* do so. And that means it may not do so. (See *Santa Cruz R. P. Co. v. Heaton* (1894) 105 Cal. 162, 165 ["as ordinarily used in a statute, the word 'may' does not denote the imperative mood of the verb to which it is attached, but merely imports permission, ability, possibility, or contingency; and should never be interpreted or understood as mandatory"].)" And that means that the mere inclusion of a clause in a settlement agreement is not enough by itself to confer jurisdiction without a prior court order made in the wake of a "request" of the parties, of which there is none here. Rather, the text implicitly makes it indispensable that the judge know a request has been made,

and rule on it beforehand. That is the only reading which does justice to the use of the word "may" in the statute.

DISPOSITION

Our conclusion obviates the need to consider Americair's other argument, namely that there was no jurisdiction to make an order in favor of Chicago Medical, a nonparty, in any event. Because of the lack of jurisdiction to make the order, it is reversed, with directions to enter a new order denying the motion to enforce. In the interests of justice the parties shall bear their own attorney's fees.

SILLS, P.J.

WE CONCUR:

O'LEARY, J.

MOORE, J.